INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	3
1. The statute and the Public Works Administration	3
2. The project, the loan and grant agreement, and the revenue bonds of the County	10
3. Proceedings in the courts below	20
Argument	24
I. Introductory: Scope of the brief	24
II. The alleged improper purpose of the Administrator	27
The findings of the courts below	27
The testimony of the Administrator	30
The Administrator's Book	34
The testimony of the witness Rose	43
Press Release No. 989	46
Testimony concerning activities of the Electric Power Board of Review in relation to other projects	46
The testimony of the Director of the Power Division	56
The effect of statements of members of the Electric Power Board of Review in the light of their limited authority and of the Administrator's action	61
III. The irrelevance of the alleged improper purpose or motive of the Administrator	64
IV. The standing of petitioner to challenge the validity of the Federal statute or to assert a violation thereof	70
V. The contention that the District Court erred in receiving new evidence	72
Conclusion	80

CITATIONS

Cases:	
American Bank & Trust Co. v. *Federal Reserve Bank*, 256 U. S. 350, s. c. 262 U. S. 643	70
Anicker v. *Gunsburg*, 246 U. S. 110	69

29239—37——1

Cases—Continued. Page

Arizona v. *California*, 283 U. S. 423 34
Ashwander v. *Tennessee Valley Authority*, 297 U. S. 288 ..... 34, 67, 69
Barker Painting Co. v. *Local No. 734*, 281 U. S. 462 67
Board of Supervisors of Wayne County v. *Kennicott*, 94 U. S. 499 79
Bodkin v. *Edwards*, 255 U. S. 221 29
Calzavara v. *Planet S. S. Corporation*, 31 F. (2d) 885 61
Clarke v. *South Carolina Public Service Authority*, 177 S. C. 421 ..... 20, 77
Corning v. *Lowerre*, 6 Johns Ch. 439 71
De Cambra v. *Rogers*, 189 U. S. 119 69
Dakota Central Telephone Co. v. *South Dakota*, 250 U. S. 163 69
Farmers, etc., Nat. Bank v. *Dearing*, 91 U. S. 29 40
Georgetown v. *Alexandria Canal Co.*, 12 Pet. 91 71
Gordon v. *Thomas*, 10 F. (2d) 752 61
Hicklin v. *Coney*, 290 U. S. 169 67
Horbach v. *Coyle*, 2 F. (2d) 702 67
Industrial Association v. *United States*, 268 U. S. 64 67
Interstate Land Co. v. *Maxwell Land Co.*, 139 U. S. 569 79
Isbrandtsen-Moller Co. v. *United States*, 300 U. S. 139 69
Jones v. *Van Dorn*, 130 U. S. 685 79
Kennicott v. *Supervisors*, 16 Wall. 452 79
Lockhart v. *Leeds*, 195 U. S. 427 79
McCulluch v. *Maryland*, 4 Wheat. 316 40
Mutual Life Ins. Co. v. *Hill*, 193 U. S. 551 74
Nashville C. & St. L. Ry. v. *Walters*, 294 U. S. 405 67
Osborn v. *United States Bank*, 9 Wheat. 738 40
Panama Refining Co. v. *Ryan*, 293 U. S. 388 67
Park v. *Greenwood County*, 174 S. C. 35 ..... 20, 77
Puget Sound Power & Light Co. v. *Seattle*, 291 U. S. 619 14
Rogers v. *Hill*, 289 U. S. 582 74
Supervisors v. *Kennicott*, 94 U. S. 499 79
St. Louis Railroad v. *United States*, 267 U. S. 346 79
Tyler v. *Savage*, 143 U. S. 79 79
Warner-Quinlan Asphalt Co. v. *Carlisle*, 158 App. Div. (N. Y.), 638, 144 N. Y. Supp. 70 70
Wayne County v. *Kennicott*, 94 U. S. 499 79
Wells Fargo & Co. v. *Taylor*, 254 U. S. 175 74
West v. *Hitchcock*, 205 U. S. 80 69

Statutes:

National Industrial Recovery Act, c. 90, 48 Stat. 195, Title II:
Sec. 201 3
Sec. 202 4
Sec. 203 ..... 4, 5

Statutes—Continued. Page

Emergency Relief Appropriation Act of 1935, c. 48, 49 Stat. 115, 119, Sec. 12 9

First Deficiency Appropriation Act, fiscal year 1936, enacted June 22, 1936, c. 689, 49 Stat. 1597 9

South Carolina Act 299, 1933 ..... 11, 15, 16, 66, 77

South Carolina Act 1095, 1934 15

Miscellaneous:

Executive Orders:

No. 6174, June 16, 1933 7

No. 6198, July 8, 1933 4

No. 6252, August 19, 1933 4

No. 7064, June 7, 1935 9

Hearings on the First Deficiency Appropriation Bill, 1936 May 18, 1936, before the Subcommittee of the Committee on Appropriations, U. S. Senate, 74th Cong., 2d Sess. 6

Ickes, *Back to Work* ..... 34 *et seq.*

Public Works Administration Circular No. 1:

Pp. 9, 12 7

P. 13 8

Public Works Administration Press Release No. 989, Sept. 27, 1934 45

Public Works Administration, *Revenue Bond Financing by Political Subdivisions* 14

Sen. Doc. No. 167, 73d Cong., 2d Sess., *Report of the Business of the Federal Emergency Administrator of Public Works* for the period ending February 15, 1934 6

Sen. Doc. No. 183, 74th Cong., 2d Sess., *Pending Non-Federal P. W. A. Projects*, March 9, 1936 6

Sen. Doc. No. 184, 74th Cong., 2d Sess., *Public Works Administration Allotments for Gas and Electric Projects*, March 9, 1936 6

Sen. Doc. No. 198, 74th Cong., 2d Sess., *Non-Federal Public Works Administration Projects*, April 4, 1936 6

Story, *Equity Pleading* (10th Ed.) Sec. 40 79

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 397

DUKE POWER COMPANY AND SOUTHERN PUBLIC UTILITIES COMPANY, PETITIONERS

v.

GREENWOOD COUNTY AND E. L. BROOKS, S. A. AGNEW, AND E. I. DAVIS, MEMBERS OF AND CONSTITUTING THE FINANCE BOARD OF GREENWOOD COUNTY, AND HAROLD L. ICKES, AS FEDERAL EMERGENCY ADMINISTRATOR OF PUBLIC WORKS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT ADMINISTRATOR

OPINIONS BELOW

The opinions of the District Court on the first hearing (R. 117, 477) are reported at 10 F. Supp. 854, and 12 F. Supp. 70. The order of the Circuit Court of Appeals remanding the cause is found at R. 515, 517. The opinion of the District Court at the conclusion of the second hearing is found at R. 518. The first opinion of the Circuit Court of

Appeals is reported at 81 F. (2d) 986. The opinion of the District Court on the third hearing, following the order of this Court, 299 U. S. 259, is found at R. 744, and its findings of fact and conclusions of law at R. 779–790, 791–799. The opinion of the Circuit Court of Appeals (R. 848) is reported at 91 F. (2d) 665.

JURISDICTION

The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1935.

QUESTIONS PRESENTED

1. Whether petitioner, as holder of a non-exclusive franchise for the generation and distribution of electric power, has standing to enjoin the respondent Administrator from making a loan and grant to the County of Greenwood, South Carolina, the proceeds of which are to be used in the construction by the County of a hydroelectric project, the construction and operation of which is a lawful undertaking of the County.

2. If the first question is answered in the affirmative, then whether the loan and grant agreement between the County and the United States is authorized by Title II of the National Industrial Recovery Act; and whether the statute is a valid exercise of Congressional power.

3. Whether the court below erred in construing the mandate of this Court as authorizing a full new hearing in the District Court.

STATUTES INVOLVED

These will be found in the Appendix, separately printed.

STATEMENT

This suit was brought by petitioner, Duke Power Company, against the County of Greenwood, South Carolina, and the members of its Finance Board, to enjoin the construction by the County of a hydroelectric generating and distribution system with funds to be advanced as a loan and grant by the respondent Administrator pursuant to Title II of the National Industrial Recovery Act. The respondent Administrator was made a party defendant on his own application (R. 65). The statement of the case will describe, in order, (1) the statute and the Public Works Administration, (2) the proposed project, the loan and grant agreement, and the revenue bonds of the county, and (3) the proceedings in the courts below.

1. THE STATUTE AND THE PUBLIC WORKS ADMINISTRATION

Section 201 (a) of Title II of the National Industrial Recovery Act, approved June 16, 1933, c. 90, 48 Stat. 195, authorized the President, in order to effectuate the purposes of that Title, to create a Federal Emergency Administration of Public Works, all the powers of which should be exercised by a Federal Emergency Administrator of Public Works. Pursuant thereto the respond-

ent Harold L. Ickes was appointed Administrator by Executive Order No. 6198, dated July 8, 1933.[1] As set forth in Section 203 (a), the purpose of Title II was to increase employment quickly by means of the construction, and financial aid in the construction, of various types of public works.

Section 202 of the Act required the Administrator, under the direction of the President, to prepare a comprehensive program of public works, which should include, among other things, certain enumerated classes of projects. These may be described, in abbreviated form, as follows: (a) construction, repair, and improvement of public highways and park ways, public buildings, and any publicly owned instrumentalities and facilities; (b) conservation and development of natural resources, including control, utilization, and purification of waters, prevention of soil or coastal erosion, development of water power, transmission of electrical energy, and construction of river and harbor improvements and flood control (with the proviso that river and harbor improvements must have been adopted by Congress or recommended by the Chief of Engineers of the Army); (c) any projects of the character heretofore constructed or carried on by public authority or with public aid to serve the interests of the general public; (d)

[1] Executive Order No. 6252, dated Aug. 19, 1933, delegated to the Administrator certain functions and powers of the President under Title II of the Act. See Appendix, pp. 44–47.

construction or repair under public regulation or control of local housing and slum-clearance projects; (e) any other project of a character theretofore eligible for loans under subsection (a) of Section 201 of the Emergency Relief and Construction Act of 1932.

Section 203 of the Act authorized the President, through the Administrator, with a view to increasing employment quickly while reasonably securing any loans made by the United States, to construct, finance, or aid in the construction or financing of any public works project included in the program prepared pursuant to Section 202; and to make grants to states, municipalities, or other public bodies for the construction, repair, or improvement of any such project, in an amount not exceeding 30 per cent of the cost of the labor and materials employed upon such project.

The public works thus authorized are of two major classes, which have been kept distinct in the administration of the Act: (1) Federal projects, that is, those undertaken and constructed by agencies of the Federal Government, and (2) non-Federal projects, that is, projects undertaken, constructed, and to be carried on by non-federal agencies. Non-federal projects include (a) those undertaken and constructed by states or their subdivisions, and (b) those undertaken and constructed by private agencies, such as railroads. The questions presented in the present case, as in Nos. 84 and 85, relate solely to financial aid,

through loans and grants, to states and their subdivisions.[2]

Applications for loans and grants to states and subdivisions were examined in the first instance by the field organization of the Public Works Administration, and were submitted thereupon to the central organization in Washington.[3] The Administration, in addition, examined at the outset 526 projects turned over to it by the Reconstruction Finance Corporation, pursuant to Section 301 of the Act. These and the other applications of states and subdivisions were submitted to the several

[2] This classification of projects has been consistently followed by the Public Works Administration, as indicated by its official reports to Congress. See *Report of the Business of the Federal Emergency Administrator of Public Works for the Period Ending Feb. 15, 1934*, Senate Document 167, 73rd Cong., 2nd Sess., transmitted pursuant to Senate Resolution No. 190 (301 pages) (Def. Ex. 70); *Pending Non-Federal P. W. A. Projects*, Sen. Doc. 183, 74th Cong., 2nd Sess., March 9, 1936, transmitted in response to Senate Resolution No. 234 (132 pages); *Public Works Administration Allotments for Gas and Electric Projects*, Sen. Doc. 184, 74th Cong., 2nd Sess., March 9, 1936, transmitted pursuant to Senate Resolution No. 235 (19 pages); *Non-Federal Public Works Administration Projects*, Sen. Doc. 193, 74th Cong., 2nd Sess., April 4, 1936, transmitted pursuant to Senate Resolution 271 (115 pages). See also Testimony of the Administrator during the Hearings on the First Deficiency Appropriation Bill, 1936, May 18, 1936, before the Subcommittee of the Committee on Appropriations, U. S. Senate, 74th Cong., 2nd Sess.

[3] The outline of procedure which follows is based, unless otherwise noted, upon the Report of March 26, 1934, Senate Doc. 167, 73rd Cong., 2nd Sess., pp. 1–8, cited in Note 2, *supra* (Def. Ex. 70).

divisions of the Public Works Administration for the preparation of advisory technical reports for the information of the Administrator: the soundness of the project from an engineering standpoint was examined by the engineering division; the adequacy of the security, where a loan was requested, was examined by the financial division; and the authority of the applicant to undertake the project and issue its obligations therefor was examined by the legal division. These advisory reports were submitted to the Administrator and to a Special Board for Public Works appointed by Executive Order No. 6174, dated June 16, 1933, consisting of the Secretary of the Interior, Chairman; the Secretary of War; the Attorney General; the Secretary of Agriculture; the Secretary of Commerce; the Secretary of Labor; the Director of the Budget; and two additional members (Appendix, p. 42). Where the Administrator and the special board recommended the inclusion of the project in the comprehensive program of public works, and the making of a loan and grant therefor, such recommendation was submitted to the President for his approval or rejection. Following approval by the President an agreement was entered into with the applicant for the making of the loan or grant or both, as the case might be. Where loans were made, a uniform rate of interest of 4 per cent was prescribed. See Circular No. 1, pp. 9, 12 (Pl. Ex. 36, separately certified). The form of security

offered by the applicant varied with the type of project and the applicable state law; eligible security included general obligation bonds supported by the taxing power of the state, bonds payable out of earnings of the project, i. e., revenue bonds, special assessment bonds, and other types of municipal bonds. See *id.*, at p. 13. Where grants were made, they were uniformly in the amount of 30 per cent of the cost of labor and materials employed upon the project.

As of the date of the last trial in the District Court in February 1937, 9389 non-Federal projects of many different types and extending into every county in the United States except three had been approved by the Public Works Administration and funds aggregating $1,480,612,543 allocated therefor. Of this number 282 are electric power projects, 92 of which are located in places where privately owned electrical facilities are now operated—190, or more than two-thirds, being noncompetitive. The 92 allocations for competitive power projects total $27,339,947, representing less than one percent of the total allotments in number and two percent in amount. In addition thereto $54,000,000 had been allotted for several large water projects, which include power generating facilities along with other features, such as irrigation, flood control, and navigation (Fdg. XV, R. 786–787; R. 676).

The authority to make loans and grants was to terminate, according to Section 201 (d) of the Act,

two years after the enactment of the Act, or sooner if the President or the Congress should declare that the emergency had ended. It was provided, however, that funds might be issued to a borrower under the provisions of the Act at any time prior to January 23, 1939, pursuant to any agreement or commitment to bid upon or purchase bonds which had been entered into with a borrower prior to the date of termination of the power to make loans under the Act. The Emergency Relief Appropriation Act of 1935, Chap. 48, 49 Stat. 115, 119, enacted April 8, 1935, provided in Section 12 that the Federal Emergency Administration of Public Works was continued until June 30, 1937, made available until June 30, 1937, all sums appropriated to carry out the purposes of Title II of the Recovery Act, and authorized said Administration to perform such of its functions under Title II as might be authorized by the President. Pursuant to this section the Public Works Administration was authorized, by Executive Order No. 7064, June 7, 1935 (Appendix, p. 48), to continue after June 16, 1935, to perform all the functions which it was authorized to perform prior to June 16, 1935, under Title II of the Recovery Act. The First Deficiency Appropriation Act, fiscal year 1936, enacted June 22, 1936 (49 Stat. 1597, 1608, Appendix, p. 37), provided in Title II that, subject to certain restrictions, the Administrator might make grants to aid in the financing of public

works projects of the kind and character for which he had theretofore made loans or grants pursuant to Title II of the Recovery Act or the Emergency Relief Appropriation Act of 1935. The Public Works Administration Extension Act of 1937 extended to July 1, 1939, the provisions of law relating to the availability of funds for carrying out the functions of the Administration (Appendix, p. 39).

While Title II of the Recovery Act furnishes a complete basis for the proposed loan and grant in the present case, the subsequent acts are of importance in confirming the authority to make loans and grants for power projects, and for the Greenwood County project specifically, and those acts are therefore relevant in connection with the questions of statutory authority and delegation of power. (See Government's brief in Nos. 84 and 85, pp. 104–118).

2. THE PROJECT, THE LOAN AND GRANT AGREEMENT, AND THE REVENUE BONDS OF THE COUNTY

On its own initiative Greenwood County filed an application on November 16, 1933, with the local agency of the Public Works Administration for a loan and grant in the amount of $2,627,197 to finance the construction of a hydroelectric plant and distribution system at Buzzard's Roost on the Saluda River in South Carolina (R. 267, 687, 694). Authority to issue revenue bonds for a project of that type, as well as for a great variety of other

enterprises, had been conferred upon counties and other political subdivisions by a statute of South Carolina enacted May 8, 1933, prior to the enactment of Title II of the Recovery Act. South Carolina Act 299, 1933, subsequently amended (Appendix, pp. 56, 75).

Seven months after the application of the County was filed it was approved by resolution of the Administrator and Special Board for Public Works on June 20, 1934, and was included in the comprehensive program of public works (R. 369). Presidential approval followed (*Ibid*). Because, however, of a protest filed by the Duke Power Company, requesting a hearing on the proposed loan and grant, the approval was suspended (R. 463), and the company was granted a hearing on July 2, 1934, before the Electric Power Board of Review (Def. Ex. 57, separately certified). The grounds of the company's objection to the project were stated to be "that the proposed project will not be self-liquidating, will be uneconomical, will not be in the public interest, but will be detrimental to enterprises which are already adequately serving the territory in question" (Def. Ex. 57, p. 2). On November 7, 1934, the Administrator and Special Board for Public Works again resolved that the project be approved and that an allotment in the amount of $2,852,000 be made therefor, and on November 8, 1934, Presidential approval was given (R. 368–369).

The project involves the construction of a dam, power plant and distribution facilities intended to serve three counties in South Carolina (R. 267). Approval of the project has been given by the Federal Power Commission, which assumed jurisdiction upon the application of the County on the ground that, while the Saluda River is not a navigable waterway, the construction of the project affects navigation on navigable streams (R. 400–405). The plans for the project have also been approved, so far as they affect the navigable capacity of navigable waters of the United States, by the Acting Secretary of War and the Acting Chief of Engineers of the Army (R. 406).

The application of the County filed with the Federal Power Commission indicated that several of the petitioner's customers have agreed to purchase power from the County's plant. These customers purchased from petitioner approximately 12,000,000 kilowatt hours of electric power per year (R. 340), or less than one-half of one per cent of the total sales by petitioner in the Piedmont section of the Carolinas of 2,476,000,000 kilowatt-hours in the year 1936. The increase in the sales of petitioner in 1936 over 1935 was more than 380,000,000 kilowatt-hours. The loss of 12,000,000 kilowatt-hours to Greenwood County will amount to approximately three per cent of petitioner's annual increase in sales (Fdg. 21, R. 789). In addition, the County listed as prospective customers consumers

who purchased power from petitioner in 1934 in the amount of 35,473,943 kilowatt hours (R. 341). The Duke Power Company furnishes only a small part of the power consumed in Greenwood County (R. 182).

The first agreement between the county and the United States for the making of the loan and grant was executed on December 8, 1934 (R. 73–94), more than a year after the application of the county had been filed. This agreement was superseded by the existing agreement of November 30, 1935 (R. 494–514). The material differences in the two will be noted *infra*, pp. 22–23. The existing agreement provides for the purchase by the United States of revenue bonds of the county in the aggregate amount of $2,219,000, bearing 4 per cent interest per annum, and maturing serially from 1936 to 1960. The agreement provides, further, for the making of a grant in an amount equal to 30 per cent of the cost of labor and materials employed on the project, but not to exceed in any event the sum of $682,000 (R. 495). The detailed provisions of the agreement may be grouped under two heads: (1) those relating to the security of the loan, such as the continued responsibility of the borrower and its ability to complete the project, the filing of plans and specifications, the furnishing of information concerning the progress of the work, and the carrying of insurance on the project (R. 495–499); (2) conditions precedent to the making

29239—37——3

of the loan and grant relating to the inclusion, in contracts made by the county for the construction of the plant, of provisions regarding wages and conditions of employment in such construction, as required by Section 206 of the statute (R. 499–501). The agreement contains no provision giving the Administrator any rights with respect to the operation or use of the plant. With respect to rates, the agreement provides that the Administrator and the Government shall have no rights or power except (so long as they hold any of the bonds) such rights as any holder of the County's bonds would have under the laws and constitution of South Carolina and the proceedings of the applicant taken pursuant thereto in authorizing the issuance of the bonds (R. 501).

The bonds are revenue bonds, so-called because they are payable from the revenues of the system constructed with the proceeds of their sale. Such bonds have been issued and sold by political subdivisions for decades and in substantial amounts. Cf. *Puget Sound Power & Light Co.* v. *Seattle*, 291 U. S. 619, 631; and "Revenue Bond Financing By Political Subdivisions,"[4] showing in detail that millions of dollars of such bonds have been purchased by investors, including institutional investors, and at prices and terms equal to or better than general obligation bonds payable out of taxes. The earnings from the project are segregated and the

[4] Prepared by the Public Works Administration (U. S. Govt. Printing Office, 1936).

security of the loan cannot therefore be impaired by wasteful borrowing on the part of the municipality through the issuance of general obligation bonds payable out of the city's general revenues.

Petitioner's suggestion that, because of the nature of revenue bonds, the ability of the county to compete with petitioner is greater than if the bonds were general obligation bonds is, of course, unjustified. If the bonds were payable out of the county's taxes, it could fix its rates as low as it wished and without regard to the effect on the earnings of the project, whereas its obligations under the revenue bonds, by virtue of the South Carolina statute and the terms of the bonds, require it not to fix rates so low as to impair the earnings of the project, which are pledged to secure the bonds.

The issuance of the bonds was authorized by resolution of the Finance Board of Greenwood County (R. 20–33, 102–109) acting under authority of Act 299, Acts of South Carolina, 1933, as amended, and Act 1095, Acts of South Carolina, 1934 (Appendix, pp. 56, 75). The County is required by these statutes to fix rates sufficient to provide for the payment of the interest upon and principal of all bonds issued to finance the construction of the Buzzard's Roost project as and when the same become due and payable; to create a Bond and Interest Redemption Fund therefor; to provide for the payment of the expenses of administration and operation and such

expenses for the maintenance of the project as are necessary to preserve the same in good repair and working order; to build up a reserve for depreciation of the project and to build up a reserve for improvements, betterments, and extensions to the project other than those necessary to maintain the same in good repair and working order. The County is also required to revise such rates from time to time in order to provide for the above items (Section 21, Act 299, 1933, Appendix, p. 67).

The statute gives to the bondholders what is called a "statutory lien" on the project. Such lien amounts merely to the statutory right to bring mandamus or other proceedings in an appropriate court to secure performance of the obligations imposed upon the County by the Statute (Sections 8, 9, Appendix, pp. 62–63). The statute also provides that if there be any default in the payment of the principal of or interest upon any of the bonds, any court having jurisdiction in any proper action may appoint a receiver to administer and operate the project on behalf of the County with power to fix and charge rates and collect revenues sufficient to provide for the payment of any bonds or other obligations outstanding against the project and for the payment of the expenses of operating and maintaining the same, and to apply the income and revenues of the project in conformity with the statute and the resolution providing for the issuance of such bonds (Section 10, Appendix, p. 63).

There is no right in the bondholders to foreclose on the property of the County, including the project, or to require its sale or themselves to take it over and operate it. It should be noted that the above provisions of the statute, as well as the resolution of the County authorizing the issuance of the bonds (Section 10, Appendix, p. 63), provide only for the appointment of a receiver to operate and administer the project "on behalf of the borrower," *i. e.*, the County, in accordance with the provisions of the statute which apply to the operation of the project by the County itself. The appointment of a receiver thus merely provides the bondholders with an equitable method of obtaining specific performance of the statutory obligations of the County.

The rights of a bondholder with respect to the fixing and charging of rates, simply stated, come to this. He may compel the County through appropriate court action to comply with the statutes of the State of South Carolina which set out specifically how the County shall fix its rates. In other words he has only the statutory right to invoke the aid of the courts to compel the County to abide by the law of the State of South Carolina regulating the rates the County is required to charge.

The District Court found (R. 782)—and the evidence is uncontradicted on that point—that, without consulting with the Public Works Administration, the County prepared and included in its orig-

inal application for a loan and grant, a schedule of rates for the sale of electrical energy to various classes of customers. This schedule, prepared by the County's own technical advisers, was incorporated, without alteration, in the bond resolution adopted by the County on October 6, 1934, prior to the making of any loan and grant agreement (R. 6, 20–33, 730). The original loan and grant agreement, subsequently executed on December 8, 1934, provided that the United States should not be obliged to pay the County any portion of the loan unless the County should "adopt a resolution, satisfactory in form and substance to the Administrator, providing for rates to be charged for services afforded by the hydro-electric system" (R. 83).

Under the South Carolina statute, the County is required from time to time to adjust its rates. After the new loan and grant agreement had been executed, the County, again of its own motion and without any consultation with or suggestions from the Public Works Administration, reexamined its prior rate resolution and, on December 2, 1935, adopted a new rate resolution in which it fixed the same rates (R. 730–734). It is not disputed that the County's rates comply with the requirements of the South Carolina statute and are sufficient to provide for the repayment of the proposed loan.

One of the reasons for the execution of the superseding and existing agreement of November 30, 1935, was to remove all foundation for the infer-

ence, which respondents believed contrary to the fact but which was made by Judge Watkins, that the provision of the original agreement with respect to the County's rate resolution was intended to give the Administrator either a continuing control of the rates to be charged by the County or the right to approve or disapprove the rate schedule of the County on a basis other than the interest of the Government as a prospective holder of bonds. (We do not mean to concede that such a provision would have been invalid; the question is not here involved. See Government's Brief in Nos. 84 and 85, p. 171, note 80.)

The original agreement also contained other conditions with respect to rates (Section 23 (k) and Section 24; R. 83). Both of these sections provided for a minimum and not a maximum rate. Section 23 (k) conditioned the making of payments by the United States to the County upon either—

(1) the borrower's obtaining contracts with consumers for the sale of at least 25,000,000 kwh per year of firm power at a rate of *not less* than 7.6 mills per kwh and for approximately 5,000,000 kwh per year of secondary power at approximately 5 mills per kwh; *or*

(2) submission of "evidence, satisfactory to the Administrator that the borrower will sell a sufficient amount of kw hours as will, in the opinion of the Administrator, produce the equivalent total revenues" (R. 83).

The County did make tentative contracts for the sale of about one-half of its power to certain customers of petitioner. But those contracts were entered into prior to the execution of the first agreement with the United States (R. 371–398). None of those contracts was approved by the Administrator (R. 665). The present agreement between the United States and the County has no provision with respect to any such contracts.

The validity of the bonds and of their issuance to the United States was upheld in all respects under the law of South Carolina by the Supreme Court of that state in *Park* v. *Greenwood County,* 174 S. C. 35. The court rejected the contention that the bonds violated constitutional and statutory limitations on the incurring of indebtedness by a County. And in *Clarke* v. *South Carolina Pub. Serv. Authority,* 177 S. C. 421, the court sustained, under South Carolina law, a loan and grant agreement similar to that here involved.

3. PROCEEDINGS IN THE COURTS BELOW

The present suit was brought on November 7, 1934, in the District Court for the Western District of South Carolina. The bill (R. 2–20) attacked the proposed undertaking of the County as being in violation of the laws of South Carolina, alleged that the Federal statute did not authorize the loan and grant, and that the statute was unconstitutional, and prayed for injunctive relief against the County's undertaking. After answers were filed,

that of the Administrator setting out in an exhibit a contract of December 8, 1934, comprising the then existing loan and grant agreement with the county (R. 73–94), the bill was amended and supplemented (R. 109–115) to seek relief against the Administrator. Motions to dismiss the amended bill were made by the defendants (R. 115–116). The District Court rendered an opinion containing findings of fact based upon the allegations of the bill, and conclusions of law (R. 117–152), and overruled the motions (R. 152–153).

Subsequently, answers to the amended bill were filed (R. 153–156). The District Court referred the case to a Master for the taking of evidence, which related largely to the question whether the cost of constructing the project would exceed the amount of the loan and grant and whether the project would be self-liquidating. The Master reported the evidence to the court without any findings or conclusions. Thereafter the District Court rendered an opinion (R. 477–483) adopting the findings of fact which it had theretofore made upon the basis of the pleadings, except that upon the evidence introduced the court found that there was substantial evidence to support the Administrator's determination that the project would be self-liquidating. The court held that petitioner was entitled to attack the proposed loan and grant by reason of its status as a Federal and local taxpayer and franchise holder and that the proposed loan and grant was invalid. The court, accord-

ingly, entered an injunctive decree (R. 484–485), from which the respondents appealed.

In the Circuit Court of Appeals the respondent Administrator advised the Court of a superseding loan and grant agreement between the county and the United States, dated November 30, 1935, which had been executed subsequent to the taking of the appeal and which differed in material respects from the agreement of December 8, 1934 (R. 494–514; cf. R. 73–94); and prayed that the cause be remanded to the District Court with leave to the parties to amend their pleadings in accordance with the facts and for a trial or other disposition of the cause on such amended pleadings (R. 493). Similar new agreements were submitted to many other municipal borrowers (R. 644).

The new agreement was made in an effort to remove the features of the agreement to which objection had been made in this and other litigation (R. 644). All provisions of the agreement of December 8, 1934, relating to rates were eliminated,[5] and many of the provisions relating to supervision of the work of construction were eliminated or modified.[6] The agreement of November 30, 1935,

---

[5] These were: Par. 23 (i), conditioning payment of the loan and grant upon the passage of a rate ordinance satisfactory to the Administrator, 23 (k), conditioning the loan and grant upon the making of contracts for the sale of power at not less than certain specified rates; and 24, fixing minimum rates for telephone lines (R. 82–83).

[6] Paragraphs 1, 3, 6, 10, 13, and 13 (a) of Part One, and all of Part Two, were altered; paragraphs 10 (a), 15, 18, 20, 22, 23 (c), 23 (e), 23 (f), 23 (g), 23 (h), of Part One were eliminated.

contains no terms or provisions with respect to rates to be charged by the county, except the following clause (R. 501):

> 12. The Administrator and the Government shall have no rights or power of any kind with respect to the rates to be fixed or charged for the services and facilities afforded by the Project, excepting only such rights as they may have as a holder of such Bonds under the laws and the Constitution of South Carolina and the lawful proceedings of the Applicant, taken pursuant thereto, in authorizing the issuance of such bonds.

The Agreement further provides:

> 13. This Agreement is made with the express understanding that neither the loan nor the grant herein described is conditioned upon compliance by the Applicant with any conditions not expressly set forth herein. There are no other agreements or understandings between the Applicant and the Government or any of its agencies in any way relating to said Project.

The net effect of the new contract is that, once the project has been completed, the United States will have no relation to it whatever except the relation which it will occupy as an ordinary holder of the county's revenue bonds until they are sold. That many such have been so disposed of by the Public Works Administration, see the article cited *supra*, p. 14, note 4.

The Circuit Court of Appeals ordered the cause remanded to the District Court "to the end that that court may reconsider its decision in the light of the said contract and may take such further action as may be appropriate in the premises" (R. 517). Further proceedings were then had in the District Court, and on December 31, 1935, that court entered further findings of fact and conclusions of law (R. 518–527) which substantially adhered to the prior findings and conclusions, and ordered that the application to vacate the prior decree be denied (R. 527–528). The injunctive decree was made applicable to the new agreement (R. 526).

Respondents appealed to the Circuit Court of Appeals, which reversed the decree with directions that the bill be dismissed, 81 F. (2d) 986.

In a comprehensive opinion by Judge Parker, concurred in by Judge Northcott, Judge Soper dissenting, the court held that the statute authorizing the loan and grant is within the power of Congress to make appropriations for the general welfare; that the statute did not delegate legislative power; that the loan and grant agreement did not in its terms or its purpose invade a field reserved to the States; that the Administrator did not abuse his discretion in making the loan and grant; and that apart from the foregoing conclusions, petitioner was not in a position to seek injunctive relief against the loan and grant since

no right of petitioner's was invaded by the County in building the project or by the Administrator in making the loan and grant. 81 Fed. (2d) 986. Certiorari was granted on May 18, 1936.

On December 14, 1936, this Court reversed the decision of the Circuit Court of Appeals because of irregularities in procedure and ordered the cause remanded to the District Court "with directions that the decrees entered by the District Court be vacated, that the parties be permitted to amend their pleadings in the light of the existing facts, and that the cause be retried upon the issues thus presented" (299 U. S. 259). The opinion stated (p. 268), "We express no opinion on the relevancy or effect of the evidence, or otherwise upon the merits."

After the pleadings had been amended, the cause was retried before District Judge Glenn in February, 1937. All of the evidence previously in the record was re-introduced, and in addition, both parties introduced certain new evidence, practically all of it being of a cumulative nature. On June 1, 1937, the trial judge rendered an opinion favorable to the defendants (R. 744–778). Comprehensive findings of fact and conclusions of law were entered (R. 779–799), and a decree was filed dismissing the bill on the merits (R. 799–800).

The case was appealed by petitioner to the Circuit Court of Appeals and on August 6, 1937, that Court handed down its decision affirming the de-

cree of the trial court, except as to costs (R. 848–878). The court considered and concurred in the findings of the District Court, and reaffirmed with a full opinion its earlier conclusion that the statute and the action of the administrator were valid, and that petitioner had no standing to complain (R. 848). Certiorari was again granted on October 25, 1937.

ARGUMENT

I

INTRODUCTORY: SCOPE OF THE BRIEF

Since the questions presented in the instant case are in all essential respects the same as those discussed in the Government's brief in Nos. 84 and 85, it will not be necessary to repeat here the arguments there set forth. Reference thereto is respectfully made. This brief will be confined to a discussion of the evidence relating to the so-called policy or purpose of the Administrator; and to a discussion of certain contentions made by petitioner concerning (a) the relevance of the alleged improper policy or purpose of the Administrator; (b) the standing of the petitioner to challenge the validity of the proposed loan and grant; and (c) the propriety of the scope of the hearing in the District Court following this Court's vacation of the decree.

II

THE ALLEGED IMPROPER PURPOSE OF THE ADMINISTRATOR

The findings of the courts below

Virtually the only issue on which there was any dispute in the evidence was the question of the purpose or policy of the Administrator in making the loan and grant. As indicated at pages 64–70, *infra,* and at somewhat greater length in the Government's brief in Nos. 84 and 85, it is our position that the Administrator's purpose or policy in approving the loan and grant is irrelevant both as a matter of fact and as a matter of law.

But even if the Court should consider the policies or purposes of the Administrator relevant, petitioner is bound by the findings of the two courts below rejecting petitioner's allegations in the light of the evidence.

In this connection, the trial court found (R. 788):

> I find that the defendant, Harold L. Ickes, Federal Emergency Administrator of Public Works, in making this allotment of funds to Greenwood County and in entering into the contract with the county, had no purpose other than that set out in the Act of Congress and that the policy of the Public Works Administration is correctly set out in the Administrator's report to the United States Senate (73rd Congress, 2nd session, Senate Document 167; Defendants' Exhibit 70):

> "The fundamental purpose of the Public Works Administration is to relieve unemployment and to increase purchasing power through the construction of useful public works, thereby increasing the consumption of goods and also providing employment in the capital goods industry."

And the Circuit Court of Appeals, in discussing this question, said (R. 866):

> The contention of the plaintiff is that the action of the Administrator in making such a loan and grant should be enjoined on the ground that, in making same, he is actuated by the motive of reducing power rates and that, in any event, the construction of the project made possible thereby will have that effect. There are several answers to this, each of which seems to us to be complete and final.
>
> In the first place, the court below has found, and the finding is supported by evidence, that the Administrator was not actuated by such motive in making the loan and grant to the county; that the Administrator will have no power to coerce or control the action of the county in the matter of rates; that any effect which the construction of the project will have on the rates will be the result of competition which the county will voluntarily enter into; and that on account of differences in cost, overhead, taxes, etc. the project will not provide a criterion for the fixing of rates of private enterprises. The contention of plaintiff,

> therefore as to the motive in the making of the loan and grant here involved must fail on the facts.

Under the established practice of the Court, such concurring findings will not be disturbed unless clear error is shown. *Bodkin* v. *Edwards*, 255 U. S. 221, 223. No contention is made by petitioner, nor could it be made, that the record is without substantial evidence to support the findings.

Indeed, it is doubtful whether petitioner, in view of its limited specification of errors, is in a position to raise any question with respect to the findings of fact. The petition (p. 11) states, after adopting by reference the assignments below, 34 in number, that "The errors assigned raise the questions set forth in the foregoing statement of questions presented," referring to pages 3 and 4 of the petition; at that point but five questions are set forth. The brief (p. 12) under the heading "Specification of Errors" states that the errors specified raise three principal questions, one stated with three subdivisions. Apart from the general reference to the assignments below, neither in the specification of errors in its brief nor in its statement of questions presented in its petition has petitioner assigned error concerning the findings of the District Court.

In the light of the foregoing, it is perhaps unnecessary to enter upon a review of the evidence. Nevertheless, in view of the fact that petitioner's

brief is largely devoted to a discussion of that subject, and in view of the nature of the allegations made, we shall turn to a consideration of the evidence in what is doubtless greater detail than the circumstances of the case require.

The testimony of the Administrator

There is ample evidence to sustain the findings of the two lower courts as to the purposes and policies of the Administrator.

The Administrator testified at the second trial before Judge Watkins, substantially as follows:

Neither the Administrator nor the United States has initiated or instigated or induced the making of applications for competitive power projects. That was true specifically in the case of Greenwood County. Where a loan to a city was based upon revenue bonds, the sole interest of the Administrator in the rates of a competing utility related to the question whether or not the rates to be charged by the city would enable it to repay the loan. Where loans were to be made on general obligation bonds (payable out of taxes), no consideration was given to the rates of the project.[7] If the people of the local community wanted to own their utilities and were able to finance them, they should not be denied that opportunity merely because the rates necessary to be charged were equal to or in excess of

[7] See *infra*, pp. 52–53 as to one exception; namely, where the city was in poor financial condition.

competitive rates. The Public Works Administration did not attempt to dictate on that subject (R. 646–648, 661).

The Administrator further testified that his sole interest in the rates of the County of Greenwood was that they should be large enough to give reasonable security for the investment of the United States. It was only because petitioner's rates might affect the County's earnings that he had any interest, as Administrator, in petitioner's rates. If petitioner reduced its rates below the cost of producing and supplying current, and the County had to meet those rates in order to hold its customers, it would have an indirect effect. The Administrator's interest in the County's rates was the same as any banker would have in buying its bonds. The loan and grant to Greenwood County would have been made "regardless of the rates, or our opinion of the rates, of the Duke Power Company, if Greenwood County had the legal authority to enter into the contract with us, and if Greenwood County could satisfy us that it could liquidate the loan that we made. Those were the considerations." (R. 642–643; 647; 667; cf. Fdg. 19, R. 788–789.)

"As to whether I am in favor of municipalities owning their own plants, my personal view is that it depends upon the situation. In my own village of Winnetka, Illinois, we have owned and operated our own plant for a good many years with entire sanction and approval, including that

of the greatest group of utility lawyers living near Chicago. Some communities are so badly administered, their politics are so corrupt, they cannot be trusted to own and operate their own utilities, and in other instances they can'' (R. 661–662).

The Administrator further testified that neither he nor the United States intended to exercise any control or influence of whatever kind over the rates to be charged by the County nor to control directly or indirectly the rates of petitioners.[8] Nor did the Administrator or the United States intend to engage in the operation directly or indirectly of the County's power project. In passing upon projects such as that of Greenwood County no considerations were weighed other than those involved in other types of applications. Of the total aggregate of non-federal projects, measured in money terms, competitive municipal power projects would probably not exceed approximately two per cent or less. The contracts which Greenwood County made for the sale of power to be produced by its project had never been presented to the Administrator, and he did not know whether they had been presented to anyone else in the Pub-

[8] The provision in the former contract of December 8, 1934 (not contained in the present contract), with respect to the adoption of a rate resolution by the County satisfactory to the Administrator, was intended to relate solely to the initial rates and he did not understand that it gave him a reservation of future power with respect to rates (R. 650, 666–667). See also, pp. 18–19, *supra*.

lic Works Administration.[9] (R. 647–648, 650, 657, 665).

The Administrator further testified that he had the same interest any banker would have in buying the bonds, and would not have entered into a contract with the county if the rates had not shown a sufficient prospective income based on those rates to liquidate the loan. "The rates as such were not approved by the PWA authorities. We knew that those rates were sufficient. If the rate were a lower rate applied to a larger sale of power which would have been sufficient in the aggregate to liquidate the obligation to the United States, that would have been a satisfactory arrangement. On the other hand, if it had been a higher rate, applied to a lesser amount of power sold, which would yield enough to liquidate the obligation of the United States, that would have been a satisfactory arrangement" (R. 665–666).

---

[9] That testimony related to section 23 (k) of the old contract (not contained in the existing contract) to the effect that the Administrator was not obliged to pay any money to the County if it had not obtained contracts with consumers, satisfactory to the Administrator, providing for the sale of a stated amount of power at "not less than" a stated rate, or, in the alternative, if the county did not present evidence that it would sell a sufficient amount of power to produce the equivalent total revenues (R. 83). That provision did not (as petitioners intimate) have the effect of bringing about a reduction of rates, since it did not refer to maximum, but only to minimum rates, and to those only as one form of evidence regarding adequacy of revenues. See *supra*, p. 19.

The Administrator's Book

On cross-examination, petitioner's counsel read to the Administrator selected passages from his book, "Back to Work," published June 1935 (R. I. 653–664). After reading a selected passage from a given page, he would ask whether the book had so stated and would receive an affirmative answer. He would then turn to another selected passage on another page and do the same, thus tending to create the impression that the separated passages were related. Much of the "testimony" of the Administrator on cross-examination, referred to in petitioner's brief, is simply the product of that course of questioning.

To avoid the delay and confusion incident to bringing out, on redirect examination, a detailed explanation in each instance of the false picture of the book thus created, defendant's counsel offered the entire book, and it was admitted in evidence as defendant's Exhibit 85 (R. 667). It has been separately certified as part of the record (R. 667).

The book consists of 268 pages. Of those 268 pages, 2 chapters—5 and 6, pages 99 to 147—are devoted to the subject of power. The first of these two chapters and 14 pages of the second chapter (pp. 99 to the middle of p. 135) are devoted exclusively to federal power projects where the Federal Government is using its war power and interstate commerce power (*Arizona* v. *California,* 283 U. S. 423; *Ashwander* v. *Tennessee Valley Authority,*

297 U. S. 288). Petitioner's description of the book and the juxtaposition of excerpts from the discussion therein of federal power projects and excerpts from the few pages dealing with non-federal (state and municipal) projects tend to create so misleading an impression that we call attention to the following actual sequence of chapter six, from which petitioner has quoted: It begins (p. 122) with a discussion of the great potential value of unused falling water in the United States. Then follows (pp. 123–124) a discussion of a rate survey throughout the United States made by the Federal Power Commission. Reference is then made (pp. 124–125) to the establishment of a National Power Policy Committee established by order of the President, "for the 'purpose of developing a plan for the *closer cooperation of the several factors in electric power supply, both public and private,* whereby national policy in power matters may be unified and electricity be made more broadly available at cheaper rates to industry, to domestic and particularly to agricultural consumers; the committee is to be advisory to the President.'"

Then follows a discussion of federal power projects established by the Federal Government with the use of Public Works and other funds, with specific reference to federal dams at Boulder, Grand Coulee, Bonneville, and the Wilson and Norris dams, and a discussion (p. 126) of the benefits of

the cheaper power resulting from the sale of power generated at those dams. The eight pages following (pp. 126 to 134) are devoted to a discussion of the activities and benefits of the Tennessee Valley Authority. In this context (p. 135) the following statement is made: "This TVA enterprise has appealed particularly to the public imagination because of its magnitude and on account of the broad social concept that underlies it. Yet this is not the only front upon which the government, under its PWA program, has been advancing against those utility interests that have been exacting unconscionable tribute from the people of the United States for so many years." This is immediately followed by a discussion of another federal, a reclamation, project, the Casper Alcova, in Wyoming. Up to this point there is no discussion whatsoever of any nonfederal (i. e., State or municipal) projects, the discussion being confined to Federal projects built by the United States itself pursuant to its war powers, its power over commerce, and its power over public lands; including at least two projects—the Boulder and Wilson dams—whose validity has already been sustained by this Court.

Beginning at the bottom of page 135 there occurs, for the first time, a discussion of loans and grants to states and their subdivisions for rural electrification. On page 136 begins a discussion of loans and grants for municipal power projects. For two pages there is a discussion of the security

behind such loans and the standards required with respect thereto. On page 137 it is stated that the question of building such projects is left to the determination of the local community. On pages 137 to 140 it is stated that, in reaching that determination, the municipalities may well have in mind other considerations than cheap power, i. e., the elimination of the corrupting influence of certain utilities and their stock manipulations, with specific reference to the activities of an individual not involved in these cases.

It is obviously misleading to take a few sentences from the context of a discussion of specific abuses, or of Federal power projects, and to draw therefrom a generalization regarding the purpose of the Public Works Administration in making loans and grants for municipal projects. The process is doubly misleading unless the nature of the book itself is borne in mind.

The book was not an official report, but was written for popular reading; as the preface states, it treats the subject "in broad outline," in order to inform "the people, whose money it was," how the Public Works Administration had expended the funds under its control.

The book describes, as its title indicates, the increase in employment resulting from the public works program, both in connection with Federal and non-Federal projects. In addition, it discusses the incidental and collateral benefits, not only of the public works program but of the work

of other Federal agencies such as the Reclamation Service, the Bureau of Roads, and the Tennessee Valley Authority. In venturing into this more controversial field, the book joins issue on the question of popular justification for enacted legislation, and enters somewhat into the realm of polemics. While the book may not always differentiate with meticulous precision between the direct and indirect consequences of the activities of the Federal Government, it is submitted that more care is shown in this regard than is often found in the utterances of public officials surveying the accomplishments of the Government.

Thus on pages 146–147 of the book is the following passage:

> One of the most important accomplishments of PWA, *although an indirect one,* has been a saving to consumers of millions of dollars through the lowering of rates by the private utilities to meet the charges proposed by applicants for public power projects. The rejection or withdrawal of some of the 200 applications that PWA did not approve was the result of this reduction of rates by the private companies to a point where there seemed no necessity or justification for a municipal plant. These "yardsticks" provided by both municipal and Federal enterprises are so valuable that they alone would warrant PWA's expenditures for power undertakings. The municipal projects have caused private utilities to adjust their rates downward in wide

> areas and the Federal projects have brought about rate adjustments over still larger expanses of territory.

The Court will observe the words we have italicized in the above quotation. Yet three times in its brief (pp. 21, 53, 33) petitioner quotes this passage, each time omitting the important qualifying phrase which shows that the result referred to by the Administrator was "*an indirect one.*" Petitioner apparently justifies its truncated quotation on the basis of the similar form in which the passage was read to the Administrator by counsel for petitioner at the trial (R. 663).

The words which we have italicized in the above quotation are immensely significant. They show that the Administrator was stressing an indirect or collateral consequence of Public Works activities. In a book, written for popular consumption, concerning the accomplishments of the Administration of which he was the head, it was not to be expected that the Administrator would confine himself to the direct and primary effects of the program. It was well known that the Public Works Administration had put millions of people to work; doubtless the incidental and collateral effects of its program, also of public interest and importance, were less well known or understood.

There is admirable historic precedent for such reference to the collateral consequences of valid Federal activities. Thus Alexander Hamilton, in urging the enactment of legislation establishing

the Bank of the United States, in his first famous Report on that subject, dealt at length with the collateral advantages to the country of the creation of such an institution. When subsequently, after the legislation had been enacted by Congress, President Washington, seeking advice as to whether or not he should veto it, requested Hamilton to justify the constitutionality of the statute, Hamilton wrote his famous second Report. There he omitted all references to collateral consequences. His legal argument was to a large extent adopted by this Court [10] in its two celebrated opinions on the bank.[11]

Petitioner (Brief pages 22–23) quotes selected passages from the Administrator's testimony on cross examination dealing with the book, in an effort to make it appear (1) that the Administrator made the loan and grant to the county for the purpose of reducing the Duke Power rates because he thought them too high and (2) that his views on the subject of those rates were based on mere guesswork.

But petitioner quotes only a portion of the testimony from R. 654, omitting the following significant part of that testimony appearing a few lines below on the same page:

> I was interested in the Duke Power Company's rates because they had a bearing

[10] See the comment to that effect in *Farmers, etc. Nat. Bank* v. *Dearing*, 91 U. S. 29, 33.

[11] *McCulloch* v. *Maryland*, 4 Wheat., 316; *Osborn* v. *Bank*, 9 Wheat., 738.

> upon whether this project could be built and charge rates—sell enough power at those rates to liquidate its bonds to the Public Works Administration, with interest. It is true that the higher and more unreasonable the Duke rates were the better off we would be, so far as bondholders would be concerned, but that would not make the Duke rates reasonable.[12]

The Administrator further testified, in response to questions concerning statements in his book as to the Duke rates, that while he did not have the facts himself, he "had reason to believe that the rates charged by the Duke Power Company were excessive, based upon the cost of production" (R. 655). He "took the result of members of [his] staff" (R. 654) and made the statements in his book "on information and belief" (R. 655).

The references in the book to the protest of the Duke Power Company against the Greenwood County project are significant. The book stated that there had been bitter opposition from utility companies to the making of loans and grants for the building of municipal utility systems and private utilities had held up many such projects

[12] The Administrator immediately thereafter testified: "The unreasonableness of the rates was the concern of any individual; especially the concern of a Government official in my position" (R. 654). It is clear from the context quoted above that what he obviously meant was that, as Administrator, the unreasonableness of Duke's rates was his concern because that fact affected the loan.

for months. Typical, the book states, was the resistance to the Greenwood County project.[18] As already noted, the protest urged that the project would not be in the public interest (*supra*, p. 11), and the protest was supported, as the book points out, by emphatic representations on behalf of the Duke Foundation, a charitable organization holding approximately one-fourth of the stock of the Power Company. It was after the allotment had been approved by the President that this protest was received, and in consequence a hearing was held and the project reconsidered (R. 463). It was natural that in his book the Administrator should meet objections such as these, by showing that in fact the project would be in the public interest and that the effect on the Foundation would be negligible. While such a discussion may have no strict relation to the factors governing the administration of the public works provisions, it served to meet in the same realm of discourse objections voiced publicly by petitioner and others similarly situated.

---

[18]At page 140 it is said: "The local power company concerned is the Southern Public Utilities Company, a subsidiary of the Duke Power system. The city of Greenwood, largest in the county, owns its own distribution system and purchases electricity from the Southern. The rural districts are without electricity and many of the local textile companies obtain their power from their own steam plants. Only 21 per cent of the total power proposed to be sold, according to the application from the county, was being furnished by the private utility."

The testimony of the witness Rose

Rose, a subordinate Public Works Administration engineer, was not, as petitioner suggests, a witness for that Administration. At the hearing before the Master, in June 1935, the Administrator, though a party, was not represented by counsel (R. 157) and called no witnesses.[14] Rose was called by defendant, Greenwood County, to testify to certain engineering features of the case and to that alone.

On direct examination by counsel for the County (R. 294–298), he testified with respect to engineering costs, depreciation, and the like, and said nothing about the Duke Power Company except the following:

> I have carefully examined the electric rate schedule of the Duke Power Company, and find only Block Meter Schedules except Schedule 10, which is applicable only to resale customers. Block meter rates for large industrial customers are 30 years behind in modern electric theory. Again the Duke Power Company has spent thousands of dollars, is now spending more thousands of dol-

[14] Judge Watkins, in his second opinion (R. 525) incorrectly stated that at the former hearings the Administrator had been represented by counsel and that "one of the witnesses produced by him" was Rose. It was true that the Administrator had been represented by counsel at the hearings (on questions of law) before Judge Watkins, but the evidence at the first trial was not heard by Judge Watkins, but by the Master, which explains Judge Watkins' inadvertently erroneous statement.

> lars, and stands ready to expend still more thousands of dollars to defeat this project. Therefore it is at once apparent that Duke Power Company recognizes a great deal of merit in the project (R. 298).

It was on cross-examination by petitioner's counsel that Rose gave his version of the power policy of the Public Works Administration (R. 299–300) which petitioner stresses in its brief. On re-direct examination, by counsel for the defendant County, he said (R. 307):

> As a matter of fact in determining whether a loan will be made by PWA it is necessary to compare the applicant's proposed rates with the existing rates in the territory on account of competition. PWA has to see whether applicant's rates are low enough to make it worthwhile to change, and high enough to liquidate the debt and earn it some surplus.

On the second trial before Judge Watkins on December 12, 1935 (R. II, 642–667), the Administrator testified that he had first heard of Rose's testimony a short time previously (R. 650); that Rose was an examining electrical engineer whose duty it was to investigate and report facts and who had no power to formulate policies or participate in their formulation or the manner in which applications should be passed on, or to fix rates or to speak for the Public Works Administration with respect to anything, policy included (R. 649).

The Administrator further testified that he had read the testimony of Rose and, asked for his comments thereon, said, "Well I think he was suffering from delusions of grandeur. He had no authority to expound, or determine or say, what the policy of Public Works Administration was and he certainly undertook to do that in large measure" (R. 649). The Administrator further testified that Rose's testimony with respect to rates was not a correct statement of the policy, intentions, or purposes of the Public Works Administration. "He may have been right in his figures on rates, which I am not competent to testify in respect to, but on policy he was not correct" (R. 649).

In this connection, the language of Judge Parker in his opinion in the earlier appeal before the Court of Appeals, as to the value of Rose's testimony, seems peculiarly appropriate. He said (81 F. (2d) 986, 996):

> * * * we feel that we would not be justified in disregarding the sworn testimony of a Cabinet Officer as to the policies which are being followed by him in the discharge of his official duties, and accepting instead mere press reports or the conflicting testimony of a minor official who may not have understood the purposes of his superior, who was the one charged with the formulation of policies and the exercise of discretion.

Press Release Number 989

Petitioner next refers to PWA Press Release No. 989, dated September 27, 1934. This press release is discussed at length at pp. 16 to 18, of the Government's brief in Nos. 84 and 85, and the discussion will not be repeated here. The memorandum of Colonel Waite, also referred to (Pet. Br. 27–28) is discussed in our brief in Nos. 84 and 85 at pp. 35–36.

Testimony concerning activities of the Electric Power Board of Review in relation to other projects

Substantially all the testimony introduced by petitioner at the recent trial before Judge Glenn relates to things said and written, out of the presence and without the knowledge of the Administrator, by two of his subordinates, Messrs. Rau and Hunt, two of the three members of the Electric Power Board of Review. That Board had been created by a written order of the Administrator dated May 9, 1934 (R. 574). That order, which constitutes the sole authority of the Board and its members, shows that it was authorized merely to gather information and give advice to the Administrator, supplemental to the advice given to him by his other subordinates, the three regular Examining Divisions of Public Works Administration (Engineering, Finance, and Legal). The Board's functions were not only purely advisory, but were,

by the Administrator's order, limited to power projects. It had no power to formulate policies or to take any action whatsoever in rejecting or approving proposed projects or in negotiating with cities or utility companies with respect to rates, or for the withdrawal of applications by cities. As the other subordinates of the Administrator advised him as to other aspects of the proposed power projects, the Board restricted itself primarily to a consideration of data as to rates. The Board was, by written order of the Administrator, dissolved on March 6, 1935, some 10 months after it was created (R. 713).

The following events, which occurred not long before that dissolution, are significant as emphasizing (1) the limited powers of Messrs. Rau and Hunt, (2) the fact that the Administrator was unaware of certain of their activities in excess of their authority, and (3) that, as soon as he learned thereof, the Administrator severely admonished them:

On December 18, 1934, the Board, per Hunt, wrote a letter to the Mayor of Hiram, Ohio (R. 699) which reads in part as follows:

> On the basis of available data it appears that the project will secure no economic advantage to the Village and that it would be more desirable to accept the Company's offer than to construct the proposed plant. If the applicant concurs in this conclusion the proper procedure will be to withdraw

the application as soon as it is clear that the new rates offered by the company will be put into effect.

Would you be good enough to advise me of the Village's disposition in the premises.

When this letter came to the attention of the Administrator, he wrote a memorandum to Mr. Hunt on January 30, 1935, which appears as Defendants' Exhibit No. 79 (R. 714). In it Mr. Hunt's attention is directed to the fact that the letter to the Mayor of Hiram, Ohio, was in excess of Hunt's authority and contrary to his instructions. Part of the Administrator's memorandum is as follows:

In setting up the Electric Power Board of Review, it was my thought that it should pass upon power projects and report to me in case of disagreement with the action taken by the P. W. A. staff. I never for a moment supposed that I was creating a body that, without consulting me, would overrule not only me, but the President, and assume the right of direct negotiation with the municipalities involved.

I would be glad to have you submit to me any facts which you think would make it my duty to rescind this allotment.

In the future the power of the Electric Power Board of Review will be strictly confined to what I originally intended them to be, namely the review of power projects and the making of reports and recommendations to me for my decision.

The trial court found that the Board was empowered only to obtain information and to make advisory reports to the Administrator (R. 784).

For a more complete discussion of the limited authority of the Electric Power Board of Review, and of Messrs Hunt and Rau, see the Government's brief in cases No. 84 and 85, *Alabama Power Co.* v. *Ickes,* pages 19–25.

The testimony introduced by petitioners as to the activities of Messrs. Rau and Hunt must be read with the foregoing in mind.

At the recent trial before Judge Glenn, petitioner called a number of witnesses who testified as to correspondence and conversations with Messrs. Rau and Hunt.

Edwin Vennard testified that he was in charge of the rate department of the Middle West Service Company in Chicago. Many of the cities in which operating units of Middle West were located had made applications for loans and grants for municipal electric projects. The Middle West Company was opposed to these loans and grants because of the damage that would ensue to its operating units, and was interested in preventing their approval (R. 603). Vennard stated that he saw a press release announcing that an Electric Power Board of Review had been created in the P. W. A., consisting of Mr. Hunt, Mr. Rau, and Mr. Cook (R. 591). As soon as Vennard heard about the creation of this Board he came to Wash-

ington to confer with the Board to see "if there was some way we could avoid having the loans and grants approved; to determine if by lowering the rates we could cause the projects to be not approved" (R. 603). As a result of a number of conferences with Hunt and Rau, Vennard stated that it was agreed that if a utility company would make a rate equal to or lower than the proposed municipal rate, the project would not be approved. At times during the discussion the general question of rate reduction was referred to in terms of "social desirability"—that is, it was stated that if the proposed municipal rate was higher than the rate the utility company put in effect the project would be lacking in social desirability and would not be approved (R. 604).

A number of letters and telegrams (between Vennard and Hunt) relating to applications for power projects by cities in divers parts of the United States, but having no relation to Greenwood County, were introduced in evidence by way of follow-up of the conferences testified to by Vennard. Another witness, Byerley, president of a power company, gave similar testimony as to other projects; and letters, to and from Hunt, with respect thereto (R. 606–610), and similar correspondence between Hunt and representatives of power companies as to still other projects, were introduced (R. 619–627).

George H. Carter, of Marlin, Texas, attorney for and director of the Texas Utilities Company,

gave similar testimony with respect to the applications of Marlin, Texas, and Plainview, Texas. After filing a protest against the granting of these applications, Colonel Carter and other representatives of his company met with Rau on March 1, 1935. The Plainview application had been filed prior to December 1933 (R. 618). The representatives of the Texas Utilities Company submitted to Rau a schedule of reduced rates that they proposed to put into effect in the two Texas cities. Colonel Carter testified that Rau looked at the proposed rate schedule and stated that if the company placed in effect its proposed rate reductions, the applications of the two cities would be rejected *because the projects could not pay out* (R. 617). An allotment of a loan and grant to the City of Plainview was, nevertheless, approved shortly after the first of March 1935 (R. 618). An exchange of letters and telegrams between Mr. Hunt and Colonel Carter leading up to the meeting on March 1, 1935 was introduced (R. 611–614).

Similar testimony with respect to the allotment to Coeur d'Alene, Idaho, was introduced through the deposition of Frank T. Post, president of the Washington Water Power Company.

Petitioner (Brief, pp. 23–24) points to the fact that the Administrator in a telegram to Post stated that if the Power Company put in effect a rate reduction equal to or greater than that of the city the "Electric Power Board of Review will consider matter further." Petitioner suggests that the Ad-

ministrator thus recognized that the Board was considering applications in the light of the alleged power policy and without regard to the bearing of rates on the question of the security of proposed loans, because the proposed bonds were general obligation bonds. But that suggestion ignores the important fact that the protest from Mr. Post, president of the local power company, stated (R. 584): "We have never seen any schedule of rates proposed by the city and it is impossible for the city to make this proposed project self-liquidating under schedules of rates lower than ours," and was followed shortly thereafter by a further protest which concluded with the following significant statement:

> * * * if the City of Coeur D'Alene should construct and operate the proposed system in competition with our Company, the inevitable result will be that each system will lose money and that the City, now in a precarious financial situation, will become bankrupt (R. 589).

Obviously, if that protest was correct, the operation of the City's proposed plant, since it would "bankrupt" the city (said to be in "a precarious financial situation"), would make it impossible for the city to meet its general obligation bonds payable out of taxes; and therefore the question of the relative rates of the private and proposed municipal projects was plainly a proper subject of consideration.

Furthermore, the telegram sent to Mr. Post merely shows that the Administrator was referring the question of rates to the Board for the purpose of having that Board *advise* him (not to take action itself), and there is nothing whatsoever in the telegram to show that he knew or believed that the Board was considering rates other than from the point of view of their effect on the security of the loan.[15]

Petitioner, having been given the opportunity to offer in evidence every single instance of an allot-

---

[15] Petitioner (Brief, p. 32) refers to a letter, sent in March, 1936, from the Administrator to the Mayor of Coeur d'Alene, it saying that the letter is a clear acknowledgment that the Administrator had originally been pursuing an improper policy. But the letter in no manner bears out that assertion. There the Administrator stated that, when general obligation bonds are taken, "except in unusual instances where a bad investment by the city in a project may seriously impair its finances, P. W. A. has ignored the prospective revenues of the proposed project and therefore likewise ignored the rates of the cities and of its competitors." The letter states further that, because the Administrator had been occupied with a multitude of duties, he had failed to observe, at that time when the original loan and grant agreement was being considered, that the bonds of the city were to be general obligation bonds, and that there were no such unusual circumstances calling for any interest in rates. He further says that a short time before sending his letter of March 1936, his attention had been called to the facts, and he had reached the conclusion that the attitude expressed in the letters and telegrams sent by his subordinates (*i. e.*, a concern with rates in that instance) "was entirely unjustified" and he therefore "completely repudiated and abandoned it." He therefore offered the city a new contract which contained no provisions whatsoever with respect to rates.

ment for a power project throughout the United States, has found but this one instance where the Administrator concerned himself with rates in a case not involving revenue bonds but general obligation bonds; and in that instance, the case of Coeur d'Alene, the protest of the power company itself discloses ample justification for the consideration of rates in relation to the security of the bonds.

No letters were introduced which were written by Mr. Hunt or any other member of the Electric Power Board of Review after the receipt of the admonishing memorandum of January 30, 1935, with respect to Hiram, Ohio. It is true that Colonel Carter had his conferences with Mr. Rau with respect to the Marlin and Plainview, Texas, projects on March 1, 1935, and that Mr. Rau is alleged to have indicated at that time that if the company reduced its rates the applications would not be approved. It is significant, however, that, as above noted, the Plainview allotment was approved within a few days after the conference, in spite of Rau's alleged statement; and the Electric Power Board of Review was dissolved shortly thereafter, on March 16, 1935.

If it were suggested that the admonishing memorandum of January 30, 1935, was self serving, and prompted by the attack made in this type of litigation on the alleged improper policy of the Administrator and the efforts of power companies in

that litigation to show that he had approved the unauthorized conduct of the Board, the answer would be found in a scrutiny of the dates: On and prior to January 30, 1935, when that admonishing memorandum was sent to Hunt, no faint intimation had been made by any power company in any litigation to the effect that the Administrator's policy was evidenced by the conduct and statements of Hunt and Rau. Indeed, in the case at bar neither the original nor the amended bill (R. 2–19, 109–115) contains allegations charging anything like a "national power policy" of rate regulation; and petitioner's pleadings have in no wise ever referred to the activities of the Board or its members.

One further point should be made concerning the evidence with respect to the Electric Power Board of Review. It is clear from the testimony (and particularly of petitioner's witnesses, Vennard and Post) that insofar as the members of the Board undertook negotiations with the companies regarding comparative rates apart from their effect on the security of proposed loans, that activity operated to the advantage of the companies. An opportunity was thereby afforded the companies to delay the approval of allotments for eligible projects in the hope that the allotments might be entirely prevented. Consequently even if there had been negotiations of that sort with petitioner, as there were not, it is doubtful that petitioner would have been entitled to complain.

The testimony of the Director of the Power Division

On behalf of defendants, Clark Foreman, Director of the Power Division of PWA, was called as a witness. He testified that he was appointed Director of the Power Division on August 1, 1935, after dissolution of the Electric Power Board of Review and has been in charge of the Power Division continually since that time (R. 670). He further testified as follows (R. 670–672):

The function of the Power Division is to examine all applications for loans and grants to finance the construction of projects involving the generation, transmission, and distribution of electricity and gas and to make recommendations with respect thereto to the Administrator. The Division consists of three technical sections, a legal section, an engineering section, and a finance section. Before an application is recommended for approval the legal section must pass on its legality, the engineering section on its engineering soundness, and the finance section on the question of the reasonable security of the loan. In the case of a competitive project it is necessary to determine if the rates of the project are sufficiently low to secure business and sufficiently high to pay operating expenses and principal and interest on the loan when due. In the case of a loan secured by general obligation bonds, or in the case of a grant only, the Power Division has no interest in rates. No consideration

is given to the rates of a proposed municipal plant or of the existing private utility "for any purpose other than that of reasonable security" (R. 672).

With respect to "social desirability" Mr. Foreman testified:

> Under ordinary circumstances we assume social desirability when the application comes in from the city. If a protest is made on an application and it is pointed out that social desirability is lacking, then we carefully study that protest, as we do all protests. But our invariable rule is that social desirability of a project is to be determined by the city itself, that is to say, the applicant (R. 672–673).[16]

Since Mr. Foreman has been Director of the Power Division he has frequently discussed matters of policy with the Administrator. There has been no change in policy since his appointment (R. 673).

He testified that the loan and grant agreement with Greenwood County is typical of PWA contracts in revenue bond cases and the contract with Sandusky, Ohio, defendants' Exhibit No. 84, is typical of PWA contracts in general obligation bond cases. All contracts in power cases were changed to one or the other of those forms shortly after he became Director of the Power Division (R. 673). The significant point is that under those

[16] See further as to "social desirability", the Government's brief in Nos. 84 and 85, pp. 32–35.

forms of contracts, no provisions are made with respect to rates in any case not involving a loan, and in the case of a loan, only when it is evidenced by revenue bonds.

Mr. Foreman testified that more than 500 applications for gas and electric projects have come under his supervision during the time that he has been Director of the Power Division and that he has had a great deal of correspondence with respect to these projects (R. 671). It is therefore significant that plaintiffs were able to find but one letter, plaintiffs' Exhibit No. 74, written by Mr. Foreman, which had any discussion of the question of rates. This was a letter written to the City Clerk of Eldon, Iowa, on October 22, 1935 (R. 702). Mr. Foreman testified (R. 684) that the letter was written because the Iowa Power Company, in its protest, had stated that the proposed rates of the project would be the highest of any town of its size in the State of Iowa. He felt that this information should be passed on to the City for whatever action it desired to take. He received in reply a letter from the City Clerk of Eldon, Iowa, dated October 24, 1935, which appears as defendants' Exhibit No. 87 (R. 684–686). The City explained why the proposed rates were set up and insisted that the application be approved on that basis. After the receipt of this letter, *PWA acceded to the City's desire in the matter,* made an

allotment, and entered into a loan and grant agreement with the City (R. 686).

It is noteworthy that though petitioner's search covered a wide area extending all the way from Mount Dora, Florida, to Coeur d'Alene, Idaho, they were able to find but one letter from any member of the PWA after the date of the creation of the Power Division on August 1, 1935, which might even be remotely considered as indicating any undue interest in rates not related to the security of the loan.

If any inference could be drawn from the testimony of petitioner's witnesses, that in making loans and grants the Administrator acted pursuant to an improper policy, such inference is dispelled by the action of the Administrator with respect to the Electric Power Board of Review. (*Supra*, pp. 46–48). It is also dispelled by the uncontradicted testimony of Mr. Foreman, Director of the Power Division, with respect to policies known to and concurred in by the Administrator, and the testimony of Mr. Foreman concerning the disposition actually made of the applications to which petitioner's evidence related. He testified with respect to each of those projects dealt with by Hunt and Rau as to which testimony had theretofore been introduced by petitioner. His uncontradicted testimony (R. 673–676) was that as to five of these projects, the cities had subsequently voluntarily

withdrawn their applications; as to four, loan and grant agreements had subsequently been made, or PWA's offer had not been accepted; as to three, the applications had either been withdrawn or rejected; and as to three, the applications had been rejected; in two cases because of financial insecurity and in one because of legal defects. It is clear from Mr. Foreman's testimony that the action taken with respect to each of those projects had been without regard to the policy expressed or alleged to have been expresesd by Messrs. Hunt or Rau or the Board.

Petitioner made no effort to show that the action taken on the applications referred to in the testimony of Mr. Foreman, and previously referred to by its own witnesses, was determined or influenced by the rate policy of the private companies, apart from the effect of those rates on the security of the loan.[17]

---

[17] Petitioner (Brief, p. 28) refers to Vennard's testimony that in the case of Dowagiac, Michigan, the application of that city had been rejected when his company made a reduction of rates, and that Foreman testified that later the application was approved. Petitioner then states that it appeared that this had not occurred until after the City had made a further reduction in rates which Mr. Vennard's company had been unable to meet, citing R. 605, where Vennard testified solely with reference to a conversation with Hunt. There is no evidence to show that the Administrator was aware of this conversation with Hunt, or that Foreman knew of it or acted with reference to it when recommending to the Administrator the action which the latter took in approving the City's application.

The effect of statements of members of the Electric Power Board of Review in the light of their limited authority and of the Administrator's action

It is to be noted that all of the new evidence offered by petitioner, in support of its charges as to the alleged improper power policy of the Administrator, relates to the activities of two of his subordinates, Messrs. Hunt and Rau, who were two of the three members of the so-called Electric Power Board of Review. It clearly appears from the evidence that the Board was given very limited *express* authority, viz: to *advise* the Administrator, and no power whatsoever *to act* with respect to applications for loans and grants. That severely limited express authority cannot by any possibility be said to have given those subordinates any *implied* authority to act.[18]

They therefore had no actual authority to negotiate for a reduction of power rates, or to persuade cities to withdraw their applications. Nor can

---

[18] "The power of an agent to bind his principal by making an admission against the interest of the principal is not a part of the law of evidence, but part of the substantive law of agency." *Calzavara* v. *Planet, S. C. Corporation*, 31 Fed. (2d) 885, 887 (C. C. A. 4).

"It cannot be too often pointed out that the mere fact that one employs others to work for him does not make him chargeable with what they may say about him or his affairs while in his employ. If he employs them to talk for him, a different case may be presented." *Gordon* v. *Thomas*, 70 Fed. (2d) 752, 753 (App. D. C.).

their expressions as to policy be imputed to the Administrator for, as shown above, they had no authority to formulate policy. The doctrine of apparent authority—based upon estoppel and reliance—cannot be availed of by petitioner to enlarge their actual authority, for there is no evidence that petitioner, to its detriment, relied in any way upon any statement made or things done by Hunt or Rau. Nor can petitioner assert any acquiescence, adoption or approval on the part of the Administrator in things said and done by them, in excess of their authority, out of his presence and without his knowledge; there is no evidence whatever that he knew of their acts and negotiations, in excess of their authority, until January 30, 1935, when he wrote the memorandum with respect to Hiram, Ohio, admonishing Hunt and the Board that they had been exceeding their authority and should cease to do so; and shortly thereafter, he abolished the Board. Of course a principal cannot be deemed to have ratified or acquiesced in conduct of an agent in excess of the agent's actual authority, unless the principal is fully aware of such conduct of his agent.

Petitioner (Brief p. 37) states that the record shows that, with reference to the Greenwood County project, Hunt and the Board were acting not only with the knowledge but under the specific direction of the Administrator. But there is nothing whatsoever in the evidence to show that, with respect to the Greenwood County project, Hunt or

the Board did anything other than to gather information and advise the Administrator with respect thereto.[19] The only evidence as to their action appears at R. 463–465, 467 (Def. Ex. 57) or in the Administrator's book, and shows that they were exercising purely advisory powers with respect to that project.

Even if the evidence had shown, as it does not, that the Administrator had followed the views of Hunt and Rau with respect to some other applications than that of Greenwood County and had, on that basis, rejected such other proper applications, that proof would have been irrelevant. For the mere fact that with respect to some other municipality the Administrator had failed and refused to comply with the statute would have no bearing in this case where he has complied with the statute and where the most that can even be charged is that, in addition to applying the criteria set forth in the statute, he found that the project satisfied a further and irrelevant criterion.

Petitioner (Brief, pp. 34–37) states "The evidence showing that the loan and grant in question was made as a part of the general plan to lower power rates was admissible," and under that heading quotes authorities as to the admissibility of evidence tending to show a plan. But that discussion is beside the point, for the trial court admitted

---

[19] There is no evidence in the *Alabama Power* cases that the Board took any action (advisory or otherwise), with respect to the cities whose applications are there involved.

all of the evidence on that subject offered by petitioner; and, as above shown, it did not prove the existence of such a plan.

For, whatever inferences may be drawn from the letters and statements of certain subordinates, the evidence shows that the views of these subordinates as to policy had no effect on the action of the Administrator. More significant is that, as shown above, when it first was made known to the Administrator that Messrs. Hunt and Rau were exceeding their express authority, he admonished them to refrain from such conduct and expressions of opinions, and that they should limit themselves to the authority given them, i. e., merely to advising him. There is evidence, above noted, that not long after that admonition these subordinates seem again to have exceeded their authority, but within two weeks of that conduct the Board was abolished.

We submit that the evidence amply supports the findings of the trial court that in making the allotment of funds to Greenwood County, the Administrator had no purpose other than that set forth in the Acts of Congress and that his policy was an entirely proper one (Fdg. 18, R. 788).

III

THE IRRELEVANCE OF THE ALLEGED IMPROPER PURPOSE OR MOTIVE OF THE ADMINISTRATOR

We have already discussed, in the Government's brief in Nos. 84 and 85 (pp. 171–180) the irrelevance of the alleged improper policy, purpose or

motive of the Administrator. Since, however, petitioner herein, even more emphatically than petitioner in those cases, advances contentions which demonstrate that irrelevance, we shall discuss those contentions briefly.

At the first trial and on the first appeal, before the loan and grant agreement was made, petitioner asserted that the Administrator's alleged improper motive or purpose or policy was made effective through the rate provision contained in the original agreement, requiring the adoption by the county of a rate resolution satisfactory to the Administrator as a condition of receiving any part of the loan and grant. The new loan and grant agreement entirely eliminates such a provision.[20] Petitioner has accordingly altered its contention and takes two inconsistent positions:

(1) Petitioner contends, first, that the original policy of the Administrator when making the first agreement was improper, and that no subsequent change in the agreement could purge that impropriety. The argument rests upon an erroneous assumption of fact: That the adoption of the county's initial rate resolution and the contracts it made with certain of petitioner's customers were instigated by the Administrator and later approved by him. The uncontradicted evidence and the find-

[20] We do not wish to be understood as conceding that such a provision concerning resale rates is invalid. We merely point out here, as in our brief in Nos. 84 and 85 (p. 171, note 61), that this question is irrelevant to a decision of the cases at bar.

ings are, however, to the contrary. The rates were determined by the county, without consultation with P. W. A., before it applied for a loan and grant, and its original rate resolution, based upon that determination, was adopted before the first loan and grant agreement was made and was never approved by the Administrator; the Administrator did not require contracts for sale of power to be made; they were made before the first loan and grant agreement was executed and without consultation with the Administration, and have never been approved by or submitted to the Administrator (see *supra,* pp. 19–20). Starting with those incorrect factual assumptions, petitioner's argument goes on to stress the fact that the allotment for the project is unchanged and that, after the termination of the first loan and grant agreement, the county again considered its rates and adopted the same rate schedule which it had previously proposed. This argument overlooks the fact that this subsequent action of the county was taken voluntarily without any prompting or suggestion from the Public Works Administration and in accordance with the requirements of the South Carolina statute that rates should be "revised from time to time" (S. C. Acts, 1933, No. 299, sec. 21, Appendix, p. 67; R. 730). The action of the county was taken, and necessarily so, without regard to any provision contained in the abandoned loan and grant agreement. In these circumstances, a court of equity

will not grant injunctive relief on the basis of the original abandoned provision regarding rates, since there can be no threat of future action thereunder.[21] See *Industrial Association* v. *United States,* 268 U. S. 64, 84; *Barker Painting Co.* v. *Local No. 734,* 281 U. S. 462, 463–464; *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, 412, 413; *Nashville C. & St. L. R. Co.* v. *Walters,* 294 U. S. 405, 415; *Hicklin* v. *Coney,* 290 U. S. 169, 172–173. In *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, the Court said (p. 325):

> Examining the present record, we find no ground for a demand by plaintiffs except as it related to the contracts between the Authority and the Alabama Power Company. *And as the contract of May 21, 1934,* with the Electric Home and Farm Authority, Inc., *and that of August 9, 1934,* for an option to the Authority to acquire urban distribution systems, *are understood to be inoperative,* the only remaining questions that plaintiffs are entitled to raise concern the contract of January 4, 1934, providing for the purchase of transmission lines and the disposition of power. [Italics added.]

---

[21] *Horbach* v. *Coyle,* 2 F. (2d) 702 (C. C. A. 8th), cited by petitioner (Br. p. 50), is inapplicable on its facts. There, the court held that "A new agreement in furtherance of and for the purpose of *carrying into effect any unexecuted provisions of a previous illegal agreement* is likewise illegal and void." That doctrine is obviously inapplicable to the case at bar. Here—even assuming that the prior loan and grant agreement was in any manner invalid—the provisions thereof, asserted by petitioner to be invalid, have been wholly eliminated.

2. Petitioner contends, in the second place, with apparent recognition of the weakness of its first contention, that, regardless of the existence of an improper purpose or intention or policy on the part of the Administrator, the damage to it will be the same; for in any event, without regard to any improper policy on the part of the Administrator, the county, if it receives the loan and grant, will be enabled to construct a system which it will operate in successful competition with that of the petitioner (Pet. Br. 53; also, 63–64, 73–74). This contention is, of course, inconsistent with the first and destructive of it.[22] For if the act complained of is the making of the loan and grant as such, without regard to the purposes or intentions of the Administrator, any discussion of an alleged improper purpose, plan or policy is manifestly irrelevant. Petitioner thus properly recognizes that the Administrator's mental attitude, by whatever name called, can neither add to nor detract from its rights or grievances.

Petitioner in speaking of the alleged "intentions" or "motives" or "policy" or "standards" or "criteria" of the Administrator is, of course, but borrowing from the thesaurus divers ways of

---

[22] Judge Soper in his first dissent in *Duke Power Co.* v. *Greenwood County*, 81 F. (2d) 986, adopted petitioner's original thesis with respect to the Administrator's alleged motives; in his second dissent in *Duke Power Co.* v. *Greenwood County*, 91 F. (2d) 665, 675, he has accepted petitioner's present inconsistent positions with respect to those alleged motives.

referring to the Administrator's mental attitude. In short, petitioner's argument comes to this: that if an officer is complying with a valid statute, and is intelligent enough to be aware of the inevitable and foreseeable collateral consequences of his compliance with the statute, and contemplates those consequences with satisfaction, and if those consequences are such that, had Congress based the statute solely on those grounds, it would have been invalid, then the conduct of the officer is unlawful. That is precisely the argument which this Court has repeatedly rejected. *Dakota Central Telephone Co.* v. *South Dakota,* 250 U. S. 163; *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288; *Anicker* v. *Gunsburg,* 246 U. S. 110, 120; *West* v. *Hitchcock,* 205 U. S. 80, 85–86; *De Cambra* v. *Rogers,* 189 U. S. 119, 122. (These cases are discussed in the Government's brief in Nos. 84 and 85, pp. 174–177.)

There are, of course, cases holding that, if an officer, mistakenly interpreting a statute, threatens action *violative of the statute,* and his threatened conduct is such that, if it were authorized by the statute, the statute itself would be unconstitutional, the threatened *conduct* may be held to be in violation of the statute and also unconstitutional.[23] But

[23] In *American Bank and Trust Co.* v. *Federal Reserve Bank,* 256 U. S. 350, it was alleged that the Reserve Bank accumulated drafts on the plaintiff bank and required payment in cash, instead of presenting them in the usual course, and that this action had no legitimate business reason. This

there it is the threatened objective conduct of the officer, not his mental attitude, which is invalid. And the doctrine of such cases has no bearing here, since here (as in the *Isbrandtsen-Moller, Ashwander* and *Dakota Telephone* cases, *supra*) the officer is not violating but is correctly interpreting and acting in compliance with the statute, which, as has been shown in our brief in Nos. 84 and 85, is itself constitutional.

IV

THE STANDING OF PETITIONER TO CHALLENGE THE VALIDITY OF THE FEDERAL STATUTE OR TO ASSERT A VIOLATION THEREOF

The Government has argued this question at length in its brief filed in the Alabama Power cases (pp. 62 to 104) and the argument will not be repeated here. We shall, however, discuss briefly a few of the authorities relied on by petitioner herein and not referred to in Nos. 84 and 85.

Other cases cited by petitioner

Petitioner (Brief, p. 81) cites *Warner-Quinlan Asphalt Co.* v. *Carlisle,* 158 App. Div. 638, 144 N. Y. Supp. 70. There a manufacturer was held entitled to sue to prevent the award of a public contract to a competing manufacturer, on the ground that the statutory provision requiring com-

---

Court held that such a course of conduct was in excess of the statutory authority of the Reserve Bank. Upon a trial, the allegations were not established, and the bill was dismissed. 262 U. S. 643.

petitive bids had been evaded. The statute itself required "that there be fair and reasonable opportunity for competition," and the court held that this right to compete could be protected by injunction. In the case at bar, the petitioner has no right to be free of the voluntary and lawful competition of the county.

Petitioner also (Brief, p. 82) cites two cases dealing with nuisances. In *Georgetown* v. *Alexandria Canal Co.*, 12 Pet. 91, relief was denied to a plaintiff who sought an injunction against an alleged nuisance, and made no averment or showing of any special damage to it. The Court in a dictum stated that what constituted a public nuisance for which a citizen could bring no action might also constitute a private actionable nuisance, if the plaintiff showed actual damages to himself; obviously the case merely holds that an action for nuisance does not lie in the absence of damage to the person complaining, but that where there is such actual damage, then there is a familiar wrong. The court discussed the other case cited by petitioner, *Corning* v. *Lowerre,* 6 Johns Ch. 439, which was an action for nuisance between two private persons; the defendant was building a house upon a public street and thereby causing special damage to the plaintiff; the court held that although the conduct of the defendant constituted a public nuisance, it was also a private nuisance and actionable as such. It is difficult to perceive how those cases have any bearing on the case at bar.

V

THE CONTENTION THAT THE DISTRICT COURT ERRED IN RECEIVING NEW EVIDENCE

Petitioner contends (Br., pp. 78–79, 54, 15) that the cause should have been considered and determined upon the record made at the first trial prior to the entry of Judge Watkin's original decree of August 26, 1935. That contention not only misconceives the purport of this Court's decree vacating the prior decrees and ordering a remand (299 U. S. 259), but is in effect a contention that this Court erred in its prior decision.

1. The decision of this Court in 299 U. S. 259, furnishes, we submit, complete authority for the scope of the new hearing. It will be useful in this connection to recall briefly the proceedings leading up to the decision of this Court.

The original decree of Judge Watkins was entered August 26, 1935 (R. 484–485). Respondents appealed therefrom, but on motion of respondent Ickes (R. 492) the Court of Appeals remanded the case for further trial (R. 515–518). Judge Watkins, on the second trial, received and reported further evidence offered by petitioner and respondent, both as to matters occurring prior to and since the decree of August 26, 1935, but held that he could consider only the evidence as to matters which had occurred subsequent to that decree, and entered a second decree reaffirming the first decree (R. 520, 527–528). When the case again came before the Court of Appeals, that court held that

Judge Watkins' ruling was erroneous, and it accordingly considered all the evidence in the record and reversed both decrees, 81 F. (2d) 986. On certiorari, this Court held that the Court of Appeals had erroneously failed, in its remand order, to direct that the decree of August 26, 1935 should be "vacated", and that as a result, "the District Court *did not understand that it was revested with complete jurisdiction*" and that "instead of considering the order of the Circuit Court of Appeals as tantamount to a vacatur of the former decree, and as operating to *revest the court with jurisdiction of the entire cause* and imposing the duty to permit proper amendment of the pleadings and a retrial and complete determination of the cause, considered its former decree as still effective, deemed the competent evidence on the new hearing to be restricted to a narrow point, and ended the proceeding with a decree simply adjudging that the original decree should not be set aside." [Italics added]. (299 U. S. at 268, 267.)

The "narrow point" to which the District Court had thus erroneously restricted the hearing is the same narrow point to which petitioner now insists the third trial should have been limited. As the Court of Appeals said in its latest opinion in this case (91 Fed. (2d) 665, 668):

> The setting aside of the decrees in the District Court left the cause in precisely the position that it would have occupied if no final decree had ever been entered; and

we think there can be no doubt as to the power of the court in an equity cause, until final decree has been entered, to hear additional evidence and modify or set aside any finding of fact theretofore made. *Forniquet* v. *Perkins,* 16 How. 82; 14 L. Ed. 854; *Glades County* v. *Detroit Fidelity & Surety Co.* (C. C. A. 5th), 65 Fed. (2d) 252; *Wagner* v. *Meccano* (C. C. A. 6th), 235 Fed. 890; *Dangerfield* v. *Caldwell* (C. C. A. 4th), 151 Fed. 554. The opinion of the Supreme Court determines none of the issues raised in the cause, but directs that, after the pleadings shall have been amended, it "be retried upon the issues then presented"; and it is well settled that the granting of a new trial by an appellate court reopens every issue in the case, except as to questions definitely and finally determined upon the appeal. *American Surety Co.* v. *Jackson* (C. C. A. 9th), 26 Fed. (2d) 248; *Shell Petroleum Corp.* v. *Shore* (C. C. A. 10th), 80 Fed. (2d) 785; *Glades County* v. *Detroit Fidelity & Surety Co., supra;* Cyclopedia of Federal Procedure, vol. 6, p. 820.

See also *Rogers* v. *Hill,* 289 U. S. 582, 587–588; *Wells Fargo & Co.* v. *Taylor,* 254 U. S. 175, 182; *Mutual Life Ins. Co.* v. *Hill,* 193 U. S. 551, 553–554.

It is clear that petitioner's position is precisely that taken by Judge Watkins at the second trial and which this Court held to be erroneous.

2. Petitioner, however, goes further in its contention and argues that not even the new loan and grant agreement should have been considered at

the hearing following this Court's decision. That argument is premised upon an allegation of law contained in the motion to remand made by the Administrator in the Circuit Court of Appeals on the first appeal. The argument is that the motion contained an allegation to the effect that Judge Watkins had held certain provisions of the old agreement to be in violation of South Carolina law and that the new agreement had eliminated those provisions; accordingly, it is argued that the Administrator sought merely an opportunity to introduce into the record the new agreement for the sole and limited purpose of showing that those provisions had been eliminated, and it is asserted that the allegation in the motion concerning Judge Watkins' decision was, as a matter of law, erroneous, so that at the most recent trial there was no occasion to receive any evidence not contained in the record made at the original hearing.

This argument of petitioner is necessarily an argument that this Court itself erred in directing the vacation of the decrees and remanding the cause for, if the allegations of the Administrator's motion to remand were in fact erroneous, that would have been apparent on the face of the record before this Court. Petitioner states (Br. —, 87):

> This court remanded the cause for retrial solely on the *allegation* of the motion of the Administrator that Judge Watkins had held that certain provisions of the contract of December 8, 1934, were in excess of

> Greenwood County's authority under the laws of South Carolina and that these provisions had been eliminated by substitution of the new contract of November 30, 1935. Upon the cause being remanded respondents failed to establish this allegation of their motion. Hence the entire basis for a retrial failed. [Italics in original.]

Whether the allegation concerning the basis of Judge Watkins' decision was correct or not was a matter which was open to the consideration of this Court when the case was before it, for the only evidence concerning the basis of Judge Watkins' decision was contained in his opinion, findings and conclusions, together with the decree entered thereon. Thus petitioner is in substance asserting that this Court should not have ordered the cause remanded but should have decided it on the prior record. Such a contention coming now for the first time can manifestly have no persuasive force.

It should be pointed out, moreover, that as a matter of fact the motion of the Administrator for a remand was not restricted in the manner asserted by petitioner. It is true that the motion did contain an allegation that the new agreement had eliminated provisions of the old agreement which Judge Watkins had held to be in violation of South Carolina law.[24] But the prayer of the motion was

---

[24] It should also be pointed out that the allegation in the motion to remand concerning the holding of Judge Watkins as to South Carolina law was not, as petitioner asserts,

not based solely upon that allegation. The motion referred to (R. 493) and incorporated the new loan and grant agreement (R. 494–514), a new and supervening fact. The motion prayed (R.

---

erroneous. For Judge Watkins held, in effect, that the rate provision of the original agreement required the County to fix rates satisfactory to the Administrator and maintain them without change thereafter. (R. 122; cf. R. 522–523.) While the respondents believed that to be an erroneous interpretation of that provision of the old agreement, nevertheless, if it was a correct interpretation, then that provision violated the statutes of South Carolina, which provide that rates in connection with such revenue bonds "shall be fixed and revised from time to time." (Act 299, 1933, Appendix, p. 67.) Moreover, Judge Watkins made findings (R. 121, 480) to the effect that the old agreement contained provisions—abandoned in the new agreement—giving the Administrator control of many matters relating to the construction of the project, with the clear implication that those provisions constituted a delegation by the County of its powers, violative of South Carolina law.

Petitioner (Brief, p. 54) argues that Judge Watkins could not have been passing on any question of South Carolina law, since in his opinion in connection with his first decree (R. 125) he referred to the decision in favor of Greenwood County by the Supreme Court of South Carolina in the case of *Park* v. *Greenwood County*, 174 S. C. 35. But the court in the *Park* case did not pass on the provisions of the loan and grant agreement, since that agreement was not before the court in that case, as appears from the pleadings in that case contained in the present record (R. 34–62). Subsequently the Supreme Court of South Carolina, in *Clarke* v. *South Carolina Public Service Authority*, 177 S. C. 421, held that the loan and grant agreement before the court in that case, and containing provisions in many respects similar to that involved in the case at bar, was not violative of South Carolina law. But the *Clarke* case was decided September 10, 1935, after Judge Watkins' original decree had been entered.

493) that the cause be remanded to the District Court with leave to the parties to amend their pleadings in accordance with the facts set forth in the motion (i. e., including the making of the new agreement), and for a trial or other disposition of the cause on such amended pleadings. The attention of the Court of Appeals was thus called to a new and supervening fact, the new agreement, and on the basis of that fact and the prayer, the Court of Appeals in its mandate, after referring to the prayer of the Administrator's motion, ordered the cause to be remanded, to the end that the District Court might reconsider its decision in the light of the new agreement and take such further action as might be appropriate in the premises. (R. 517; and see 81 F. (2d) 986, 989–990, and 91 Fed. 665, 668.) And when the case came to this Court, it held that, while the Court of Appeals had erred in not directing the vacation of the first decree, it had otherwise acted properly in remanding the cause, and accordingly this Court, on the basis of the new and supervening fact and the prayer of the Administrator's motion, directed that both decrees of Judge Watkins should be vacated and the cause remanded for further trial. In no manner did this Court limit the scope of that trial to the question whether the new contract had eliminated provisions which Judge Watkins, in connection with his first decree, had held to be a violation of the South Carolina law. The Administrator was entitled to

the relief asked in the *prayer* of his motion if the facts (i. e., the new agreement) set forth therein justified that relief. Cf. *Lockhart* v. *Leeds,* 195 U. S. 427, 436, 437; *Tyler* v. *Savage,* 143 U. S. 79, 98; *Jones* v. *Van Dorn,* 130 U. S. 685, 692; *Story's Equity Pleading* (10th Edition), Section 40. The allegation as to the effect of Judge Watkins' decisions was *an allegation of law not of fact,* and accordingly, had no force or effect. *St. Louis Railroad* v. *United States,* 267 U. S. 346; *Interstate Land Company* v. *Maxwell,* 139 U. S. 569, 578.

3. The authorities cited by petitioner (Br., pp. 87–88) have no application here. The cases cited at page 87 are all cases dealing with bills of review. In each of those cases it was held that the plaintiff had not made out a case entitling it to file a bill of review, which sought the vacation of a prior decree, and in each one of those cases this court refused, on that ground, to vacate the decree. No bill of review has been filed in this case, and the action taken by this court in vacating the decrees was not based upon the doctrines applicable to a bill of review. Petitioner, in effect, is therefore contending that this court erred in its prior decision when it ordered that the decrees should be vacated. The case of *Board of Supervisors of Wayne County* v. *Kennicott,* 94 U. S. 499, s. c., 16 Wall. 452, from which petitioner has quoted a limited excerpt, does not support its position. That case held that where this Court had reversed the de-

cree below on the merits and ordered a new trial, this Court would not again consider the issues previously decided by it when the case reached it on the second appeal. In the case at bar, in contrast, there has been no decision of any issue by this Court.

CONCLUSION

For the foregoing reasons, the decree of the Circuit Court of Appeals, affirming that of the District Court, should be affirmed.

Respectfully submitted.

HOMER CUMMINGS,
Attorney General.

STANLEY REED,
Solicitor General.

JAMES W. MORRIS,
Assistant Attorney General.

PAUL A. FREUND,
Special Assistant to the Attorney General.

ENOCH E. ELLISON,
Attorney.

JEROME N. FRANK,
Legal Counsel,

ROBERT E. SHER,
Assistant Legal Counsel, Federal Emergency Administration of Public Works.

NOVEMBER 1937.

U. S. GOVERNMENT PRINTING OFFICE: 1937

SUPREME COURT OF THE UNITED STATES.

No. 397.—October Term, 1937.

Duke Power Company and Southern Public Utilities Company, Petitioners,
vs.
Greenwood County and E. L. Brooks, S. A. Agnew and E. I. Davis, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

[January 3, 1938.]

Mr. Justice Sutherland delivered the opinion of the Court.

This case presents the same question as that just decided in Nos. 84 and 85. The respondents are essentially the same, with the addition of Greenwood County, in the State of South Carolina, and the members of the finance board of the county. The suit was brought to enjoin the construction and operation of a local electric power plant in the county, and the making of a loan and grant by the federal administrator to the county, for that purpose, under the provisions of Title II of the National Industrial Recovery Act, set forth, so far as material, in Nos. 84-85, *supra*.

The case was here on a previous writ, upon consideration of which this court, because of substantial irregularities in practice, reversed the judgment of the court below with directions to vacate the decrees entered by the district court, and remand the cause to that court with directions to permit the parties to amend their pleadings in the light of existing facts, and retry the cause upon the issues then presented. We expressed no opinion upon the merits or the relevancy or effect of the evidence. 299 U. S. 259. Accordingly, the case was remanded to the district court, and reheard. The district court, after making findings of fact and conclusions of law, dismissed the bill. The court below, upon appeal, considered the case fully, and delivered an exhaustive opinion. It held (1) that the statute, under which the administrator proposed to act, was constitutional; (2) that he acted within the power granted him by the statute; and (3) that in any event no legal right of plaintiffs was violated by what had been done. 91 F. (2d) 665; see also preceding decision, 81 F. (2d) 986.

Upon the question of petitioners' standing to maintain the suit, the lower court held, in substance, that the competition proposed by the county was lawful and that even though the administrator were without authority to make the proposed loan and grant, no legal right of petitioners was thereby invaded. The opinion upon this branch of the case is in harmony with the views we have just expressed in Nos. 84 and 85; and it follows that the decree must be, and it is,

Affirmed.

Mr. Justice BLACK concurs in the result.

A true copy.

Test:

Clerk, Supreme Court, U. S.